Filed 8/20/13 P. v. Mahoney CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BETTY ELLEN MAHONEY,

Defendant and Appellant.

F063429

(Super. Ct. No. BF133242A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Louis P. Etcheverry, Judge.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, Amanda D. Cary, and William M. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Betty Ellen Mahoney was convicted of assault with a deadly weapon after she broke a beer bottle over a neighbor's head, severing his jugular vein and partially severing his ear. In this appeal, she argues that the trial court erred when it denied her motion

pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) over two peremptory challenges she claimed had been exercised for reasons of race and sex discrimination. She also claims the trial court erred when it refused to give two jury instructions and when, for illustrative purposes, it admitted into evidence a beer bottle other than the beer bottle actually used in the assault. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL HISTORIES

The district attorney filed an information charging Mahoney with one count of assault with a deadly weapon. (Pen. Code, § 245, subd. (a).[1]) For sentence-enhancement purposes, the information alleged that Mahoney personally inflicted great bodily injury on the victim. (§ 12022.7, subd. (a).)

Among the prospective jurors questioned during jury selection were Jesse O. and Miguel G., both men with Hispanic surnames. Mr. O. stated that he worked in the oil fields as a "[f]ield inspector and level three tech"; that he was unmarried; that he had completed some college; that he lived in the southwest part of the county; and that he had never served on a jury. Mr. G. said he worked in auto parts sales; his highest education level was high school; he lived in East Bakersfield; and he had never served on a jury. Mr. G. said he would vote not guilty if the prosecutor failed to prove the defendant guilty beyond a reasonable doubt, and would vote guilty if the prosecutor did prove the defendant guilty beyond a reasonable doubt. He was comfortable with the idea that witnesses for both sides could be questioned about their credibility.

The prosecutor exercised peremptory challenges to excuse Mr. O. and Mr. G. Defense counsel made a motion under *Batson* and *Wheeler*, leading to the following discussion:

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[1]Subsequent statutory references are to the Penal Code.

"THE COURT: [State] on the record, counsel. Just before the—shortly before the recess, the evening recess, we did have a sidebar and Ms. Singh brought a Batson Wheeler motion on the grounds at that time—I will let you state your own grounds.

"MS. SINGH: Sure, your Honor. I made the motion to have after Mr. [O.] and Mr. [G.], I understand, at least from just visually for the last name, they are Hispanic, they were both male. And the motion was based on those grounds.

"THE COURT: Right. And then go ahead and put your reasoning on the record again you gave me, please, Mr. Choi.

"MR. CHOI: Thank you, your Honor. I suggested [Mr. O.] … I believed he lacked the life experience that I think will be necessary attention—to pay attention to all the facts of the case in order to determine whether or not the charged crime is true.

"As to … [Mr. G.], he definitely didn't pay attention at all. Every time a question was asked, he had to look away and then come back to us and give an answer. If he is not paying attention now, he is not going to pay attention during the trial. I don't want someone that's not going to pay attention, your Honor.

"THE COURT: Okay. And submit it, Ms. Singh?

"MS. SINGH: I will submit it.

"THE COURT: Mr. Choi?

"MR. CHOI: Submit it, your Honor.

"THE COURT: I will make—I don't make a finding there's a prima facie case. So at this point in time I will deny the Batson Wheeler motion."

The victim, Dwight Dorsett, testified at trial that he and Mahoney lived in the same apartment complex. On the night of July 24, 2010, Dorsett saw Mahoney, Mahoney's boyfriend Darren Leist, and neighbor Tim Gluskoter and Gluskoter's friend Lance Deckard, having a barbecue in front of a garage within the apartment complex. Dorsett went out to a party and returned, drunk, sometime after 11:30 p.m. He saw Mahoney and Leist sitting in front of the garage drinking beer. He asked them for a beer. He was "a

little bit loud" in asking for it. Leist told Dorsett to shut up because kids were sleeping. Dorsett and Leist argued. During the argument, Mahoney approached with a beer bottle in her hand. She grasped the bottle by its neck and hit Dorsett with it twice on his head. After the second blow, Dorsett felt the glass slice his neck and saw that he was bleeding heavily. He screamed for help and Gluskoter came to his aid. Gluskoter tied a shirt around Dorsett's neck and placed him in Deckard's pickup truck. Dorsett then passed out and woke up later in a hospital bed.

Deckard testified that, during the barbecue, he drove to a store with Gluskoter, Mahoney, and Leist to get more beer. When they returned, Mahoney and Leist got out of the truck, and Dorsett approached them and started arguing with Leist. Dorsett at first was "just running his mouth," but the confrontation escalated to yelling and then to pushing. Deckard stepped between Dorsett and Leist and tried to separate them. As he was facing Leist and telling the two men to calm down, Deckard heard a bottle break behind him. He turned and saw that Dorsett was bleeding.

Leist testified that he went inside to go to the bathroom when he arrived back at the apartment complex after going to the store with the others in Deckard's truck. When he came outside again, he saw Dorsett trying to get into the back seat of the truck with Mahoney. Mahoney was trying to get out. Dorsett then began yelling at Leist, saying "[y]ou don't need her," among other things. Dorsett swung wildly at Leist, but Leist, who was drunk, did not remember if Dorsett succeeded in punching him. Deckard did not try to stop Dorsett from attacking Leist. Leist shouted back and tried to push Dorsett away, but Dorsett continued to advance toward Leist, still swinging. Finally, Dorsett pushed or hit Leist and Leist fell onto his back. Mahoney was telling Dorsett to stop and grabbing at Dorsett's arm. Leist got back up, and Dorsett was still advancing toward him. After that, "it just went blank." He did not hear a bottle break or see Mahoney hit Dorsett with a bottle. He went to bed not knowing Dorsett had been hurt.

Mahoney did not testify, but Detective James Newell testified about what Mahoney said when he questioned her. When Newell first contacted Mahoney, she denied any involvement in or knowledge of Dorsett's injury. Leist also told Newell he was not involved in the incident. Later, Dorsett identified Mahoney in a photographic lineup. When Newell informed Mahoney of this, she presented a new story. At some point during the barbecue, she was sitting on the lowered tailgate of a pickup truck. Dorsett approached and said, "[D]o you want some dick, Betty[?]" Mahoney was offended and told Dorsett to get away from her. Dorsett walked away. Later, after the trip to the store, Dorsett got in the back seat of Deckard's truck with Mahoney after Leist went inside to use the bathroom. He sat next to her, grabbed her breast, and asked if she wanted to party. Then Leist came back outside and tried to get Dorsett out of the truck. Dorsett got out on his own and began arguing and fighting with Leist. Dorsett was punching Leist and Leist fell to the ground. Dorsett continued assaulting Leist as Leist lay on the ground. Mahoney said she hit Dorsett on the head with a bottle twice to make him stop fighting with Leist. After the second blow, the bottle broke and Dorsett grabbed his neck. Mahoney went inside as Gluskoter and Deckard put Dorsett in Deckard's truck to take him to the hospital.

Dorsett testified that he underwent three surgeries at the hospital. The bottle had cut through his jugular vein. It also partially severed his left ear, which had to be repaired by plastic surgery. At the time of trial, he continued to have pain in his shoulder, numbness in his neck, and scars. His hearing was affected.

During Dorsett's testimony, the jury was shown a beer bottle. The bottle was admitted into evidence, and Dorsett testified that it was "similar to" the bottle with which Mahoney hit him. Defense counsel had made a pretrial objection to the admission of the bottle. She said, "[M]y objection is that that was not the … actual bottle that was used in this case, none was recovered." The court overruled the objection and said it would give the jury a limiting instruction. During Dorsett's testimony, it did so:

"THE COURT: Okay. Since it is already up there, ladies and gentlemen of the jury, this People's No. 6 I think is going to be admitted into evidence once it is moved into evidence. And this is a facsimile, this is not the actual beer bottle. This is a bottle of beer that looks similar to the one that was used in the incident. Is that correct, Mr. Choi?

"MR. CHOI: Yes, your Honor.

"THE COURT: And Ms. Singh?

"MS. SINGH: Yes, that's correct.

"THE COURT: And so you will get another jury instruction on this. You may consider this but for a limited purpose. Okay. To clarify the testimony of the witness and to later clarify the evidence with regards to the bottle of beer. However, you may not consider … Exhibit 6 for the truth of the matter. In other words, it is not a bottle of beer that was at the scene that night. It is a bottle of beer that is similar."

Among the jury instructions requested by the prosecution were CALCRIM No. 3471, titled Right to Self-Defense: Mutual Combat or Initial Aggressor,[2] and

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[2]"Right to Self-Defense: Mutual Combat or Initial Aggressor

"A person who (engages in mutual combat/ [or who] starts a fight) has a right to self-defense only if:

"1. (He/She) actually and in good faith tried to stop fighting;

"[AND]

"2. (He/She) indicated, by word or by conduct, to (his/her) opponent, in a way that a reasonable person would understand, that (he/she) wanted to stop fighting and that (he/she) had stopped fighting(;/.)

"<*Give element 3 in cases of mutual combat.*>

"[AND

"3. (He/She) gave (his/her) opponent a chance to stop fighting.]

"If the defendant meets these requirements, (he/she) then had a right to self-defense if the opponent continued to fight.

CALCRIM No. 3472, titled Right to Self-Defense: May Not Be Contrived.[3] The court refused to give the jury these instructions. Explaining these rulings after the jury retired to deliberate, the court said, "I didn't see there was any mutual combat going on by the evidence" and "I didn't think there was any evidence that indicated that any of the evidence in this case was contrived to allow someone to take advantage of self-defense." The court did give CALCRIM Nos. 3470 (Right to Self-Defense or Defense of Another (Non-Homicide)) and 3474 (Danger No Longer Exists or Attacker Disabled) on self-defense.

The jury found Mahoney guilty as charged. The court imposed the lower term of two years plus three years for the great-bodily-injury enhancement, a total of five years.

DISCUSSION

I. Wheeler/Batson motion

Mahoney argues that the court erred in denying her *Wheeler/Batson* motion. We disagree.

The use of peremptory strikes to prevent potential jurors from serving on juries because of their race or sex violates the state and federal Constitutions. (*Wheeler, supra*,

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> "[However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting(,/ or) communicate the desire to stop to the opponent[, or give the opponent a chance to stop fighting].]
>
> "[A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose.]" (CALCRIM No. 3471.)

[3] "Right to Self-Defense: May Not Be Contrived

"A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." (CALCRIM No. 3472.)

22 Cal.3d at p. 277; *Batson, supra,* 476 U.S. at p. 89.) A *Wheeler/Batson* motion is the procedure used in the trial court to raise a challenge to this use of peremptory strikes. The procedure has three steps. First, the defendant must make a prima facie showing that a juror has been excused on the basis of group or racial identity. Once this has been done, the prosecutor is required to produce genuine nondiscriminatory reasons for exercising the peremptory challenge. (*People v. Jenkins* (2000) 22 Cal.4th 900, 993.) Finally, the trial court must evaluate the prosecutor's proffered reasons to determine whether purposeful discrimination has been established. (*Batson, supra,* at p. 98; *Purkett v. Elem* (1995) 514 U.S. 765, 767; *People v. Reynoso* (2003) 31 Cal.4th 903, 915.) The trial judge must make a sincere, reasoned attempt to assess the prosecutor's explanation and should make express findings about the adequacy of the proffered reasons for each peremptory challenge. (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; *People v. Sims* (1993) 5 Cal.4th 405, 431.) "[I]mplausible or fantastic justifications may (and probably will) be found [by the trial court] to be pretexts for purposeful discrimination," but a trial court has discretion to believe that any nondiscriminatory reason given by a prosecutor is genuine, even if it is "silly or superstitious." (*Purkett, supra,* at p. 768.)

In this case, the trial court ruled that Mahoney failed to make a prima facie case of discriminatory purpose. A defendant makes a prima facie case by presenting evidence that raises an inference that the prosecutor had a discriminatory purpose. (*Johnson v. California* (2005) 545 U.S. 162, 168; *Batson, supra,* 476 U.S. at p. 98.) To make a prima facie case, a defendant need *not* show it is more likely than not that the prosecutor had a discriminatory purpose; it is enough for the defendant's showing to raise an inference of a discriminatory purpose. (*Johnson, supra,* at pp. 168, 170.) We must affirm the trial court's determination that there was no prima facie case if it is supported by substantial evidence. "We examine the record of the voir dire and accord particular deference to the trial court as fact finder, because of its opportunity to observe the participants at first hand." (*People v. Jenkins, supra,* 22 Cal.4th at pp. 993-994.)

In her opening brief, Mahoney does not address the question of whether there was a prima facie case of discriminatory purpose. Her discussion is devoted exclusively to the questions of whether the prosecutor presented adequate nondiscriminatory reasons and whether the court made adequate findings about those reasons. She presents analysis about the prima facie case only in her reply brief, and even there her discussion still focuses on the claimed inadequacy of the prosecutor's proffered nondiscriminatory reasons and the trial court's lack of findings supporting those reasons. We could reverse the trial court's ruling on the *Wheeler/Batson* motion, however, only if the court erred when it found there was no prima facie case. Because Mahoney challenges the conclusion that there was no prima facie case for the first time in her reply brief, we hold that she has forfeited the *Wheeler/Batson* issue. (*People v. Tully* (2012) 54 Cal.4th 952, 1075 ["It is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party"].)

If Mahoney had not forfeited the issue, we would hold that she has shown no error in the trial court's determination that there was no prima facie case. In *People v. Kelly* (2007) 42 Cal.4th 763, 779, our Supreme Court stated:

> "'In deciding whether a prima facie case was stated, we consider the entire record before the trial court [citation], but certain types of evidence may be especially relevant: "[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, … the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention." [Citation.]' [Citation.]"

In this case, the two jurors whose excusals were challenged were Hispanic and male. Mahoney is female and, according to the probation report, White. The victim, Dorsett, is male, and the record does not indicate his race or ethnicity. The record shows that the prosecutor exercised a total of five of his 10 peremptories to excuse male prospective jurors with Hispanic last names (including Mr. G. and Mr. O.), and an additional two to excuse female prospective jurors with Hispanic last names, and three more to excuse men with non-Hispanic last names. The questions asked of Mr. G and Mr. O. in voir dire were neither searching nor unusually desultory. Their answers were unremarkable. Mahoney does not direct our attention to anything else in the record that might be relevant, for instance, whether there were male and/or Hispanic venire members whom the prosecution did not excuse, what the ethnic and gender composition was of the jury that was selected, or what was the ethnic and gender composition of the venire. In light of this, we cannot say whether the prosecutor accepted a jury with a disproportionately small number of Hispanic or male jurors, or whether he exercised a disproportionate number of his peremptories to excuse Hispanic or male prospective jurors. We conclude that the facts do not support any inference about whether the prosecutor had a discriminatory purpose.

II. Jury instructions

CALCRIM Nos. 3471 (Right to Self-Defense: Mutual Combat or Initial Aggressor) and 3472 (Right to Self-Defense: May Not Be Contrived) were requested only by the prosecution, but Mahoney now argues that they should have been given even without a request from the defense. A trial court in a criminal case is required—with or without a request—to give correct jury instructions on the general principles of law relevant to issues raised by the evidence. (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530.) Further, an appellate court can address an incorrect instruction to which no objection was made at trial if the instruction impaired the defendant's substantial rights. (§ 1259.)

The trial court correctly held that CALCRIM No. 3471 was not relevant to any issues raised by the evidence. There was no evidence on the basis of which the jury could have found mutual combat between Mahoney and Dorsett. As CALCRIM No. 3471 states, mutual combat means a fight in which the defendant and the victim both agreed to engage. There was no evidence of any such implied or express agreement. Mahoney says there was evidence of this because she "swung at Dorsett with a bottle after she had been sexually assaulted and [Dorsett] had been engaged in a struggle with her boyfriend, Darren Leist." This is only evidence that Mahoney and Dorsett were both fighting, not evidence that they first agreed to fight. There also was no evidence that, at any point before injuring Dorsett, Mahoney tried to stop fighting, indicated that she wanted to stop fighting, or gave Dorsett a chance to stop fighting. CALCRIM No. 3471 was unsupported by the evidence.

There also was no evidence relevant to CALCRIM No. 3472. Nothing in the record suggests that Mahoney provoked a fight or quarrel with the intent to create an excuse to use force. Further, any error in the refusal to give this instruction was harmless under any standard, since a finding that the claim of self-defense was contrived could only help the prosecution. Mahoney appears to be suggesting that the instruction should have been given just *because* there was no evidence to support it, since it might have prompted the jury to realize that Mahoney's claim of self-defense was *not* contrived, but the court was not required to give the instruction without a defense request for this unusual reason. The court gave standard instructions on self-defense, and we do not see how the evidence required anything more. There was no error.

III. Admission of beer bottle into evidence

We reject Mahoney's argument that the admission into evidence of a beer bottle other than the one she broke over Dorsett's head was error. On this point, this case fits squarely into the case law on replica weapons.

For "purposes of illustration," it is "entirely proper" to admit evidence of objects "similar" to those used in a crime so long as the evidence has "no tendency to evoke an emotional bias against the defendant as an individual." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1135.) It is necessary to lay a proper foundation for the evidence, which is done by showing that the substitute object is "'substantially similar to that which it seeks to illustrate.'" (*People v. Roldan* (2005) 35 Cal.4th 646, 708, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) We review the admission of this type of evidence for abuse of discretion. (*People v. Rivera* (2011) 201 Cal.App.4th 353, 362.)

Here, the prosecutor laid the necessary foundation by showing the substitute bottle to Dorsett and asking, "Is this similar to what you saw that evening?" Dorsett said yes. The court instructed the jury, "[T]his is not the actual beer bottle. This is a bottle of beer that looks similar to the one that was used in the incident." The court also told the jury, "You may consider this [bottle] but for a limited purpose.… To clarify the testimony of the witness and to later clarify the evidence with regards to the bottle of beer. However, you may not consider this [bottle] … for the truth of the matter. In other words, it is not a bottle of beer that was at the scene that night. It is a bottle of beer that is similar." Mahoney does not argue that the foundation was not laid, that the bottle was not substantially similar, or that the bottle had a tendency to evoke an emotional bias or otherwise affect the jury in any way that the actual bottle would not have done. The court's ruling was correct.

The cases Mahoney relies on are inapposite because they did not involve admission of a substitute weapon shown to be similar to the actual weapon used in the charged offense. (*People v. Nelson* (1976) 63 Cal.App.3d 11, 23-24 [error to admit dry-wall hammer to illustrate contention that victim might have been killed by such a weapon, where there was no evidence that defendant ever possessed any dry-wall hammer]; *People v. Henderson* (1976) 58 Cal.App.3d 349, 351-353, 359-360 [evidence that Derringer was

in pants pocket in bedroom not admissible to prove defendant fired revolver at police officers from bathroom].)

DISPOSITION

The judgment is affirmed.

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Wiseman, Acting P.J.

WE CONCUR:

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Levy, J.

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Peña, J.